included in the wage predeterminations of the Secretary of Labor for laborers and mechanics performing contract work subject to the Davis-Bacon Act and related statutes, the provisions of Public Law 88–349 discussed in § 5.32 of this title should be considered together with the interpretations in this part 778 in determining the excludability of such fringe benefits from the regular rate of such employees. Accordingly, reference should be made to § 5.32 of this title as well as to § 778.215 for guidance with respect to exclusion from the employee's regular rate of contributions made by the employer to any benefit plan if, in the workweek or workweeks involved, the employee performed work as a laborer or mechanic subject to a wage determination made by the Secretary pursuant to part 1 of this title, and if fringe benefits of the kind represented by such contributions constitute a part of the prevailing wages required to be paid such employee in accordance with such wage determination.

(e) *Employer contributions or equivalents pursuant to fringe benefit determinations under Service Contract Act of 1965.* Contributions by contractors and subcontractors to provide fringe benefits specified under the McNamara-O'Hara Service Contract Act of 1965, which are of the kind referred to in section 7(e)(4), are excludable from the regular rate under the conditions set forth in § 778.215. Where the fringe benefit contributions specified under such Act are so excludable, equivalent benefits or payments provided by the employer in satisfaction of his obligation to provide the specified benefits are also excludable from the regular rate if authorized under part 4 of this title, subpart B, pursuant to the McNamara-O'Hara Act, and their exclusion therefrom is not dependent on whether such equivalents, if separately considered, would meet the requirements of § 778.215. See § 778.7.

[33 FR 986, Jan. 26, 1968, as amended at 36 FR 4699, Mar. 11, 1971]

§ 778.215 Conditions for exclusion of benefit-plan contributions under section 7(e)(4).

(a) *General rules.* In order for an employer's contribution to qualify for exclusion from the regular rate under section 7(e)(4) of the Act the following conditions must be met:

(1) The contributions must be made pursuant to a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. This may be either a company-financed plan or an employer-employee contributory plan.

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.

(3) In a plan or trust, either:

(i) The benefits must be specified or definitely determinable on an actuarial basis; or

(ii) There must be both a definite formula for determining the amount to be contributed by the employer and a definite formula for determining the benefits for each of the employees participating in the plan; or

(iii) There must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust under section 7(e)(4) of the Act.

(iv) NOTE: The requirements in paragraphs (a)(3) (ii) and (iii) of this section for a formula for determining the amount to be contributed by the employer may be met by a formula which requires a specific and substantial minimum contribution and which provides that the employer may add somewhat to that amount within specified limits; provided, however, that there is a reasonable relationship between the specified minimum and maximum contributions. Thus, formulas providing for a minimum contribution of 10 percent of profits and giving the employer discretion to add to that amount up to 20 percent of profits, or for a minimum contribution of 5 percent of compensation and discretion to increase up to a maximum of 15 percent of compensation, would meet the requirement. However, a plan which provides for insignificant minimum contributions and permits a variation so great that, for

all practical purposes, the formula becomes meaningless as a measure of contributions, would not meet the requirements.

(4) The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the employer be able to recapture any of the contributions paid in nor in any way divert the funds to his own use or benefit. (It should also be noted that in the case of joint employer-employee contributory plans, where the employee contributions are not paid over to a third person or to a trustee unaffiliated with the employer, violations of the Act may result if the employee contributions cut into the required minimum or overtime rates. See part 531 of this chapter.) Although an employer's contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of marking payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employee contributions, will be borne by the employer. In such a case the return by the insurance company to the employer of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan.

(5) The plan must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer's contributions in cash instead of the benefits under the plan: *Provided, however,* That if a plan otherwise qualified as a bona fide benefit plan under section 7(e)(4) of the Act, it will still be regarded as a bona fide plan even though it provides, as an incidental part thereof, for the payment to an employee in cash of all or a part of the amount standing to his credit (i) at the time of the severance of the employment relation due to causes other than retirement, disability, or death, or (ii) upon proper termination of the plan, or (iii) during the course of his employment under circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits described in section 7(e)(4) of the Act.

(b) *Plans under section 401(a) of the Internal Revenue Code.* Where the benfit plan or trust has been approved by the Bureau of Internal Revenue as satisfying the requirements of section 401(a) of the Internal Revenue Code in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in paragraphs (a)(1), (4), and (5) of this section.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7312, Jan. 23, 1981]

PAYMENTS NOT FOR HOURS WORKED

§ 778.216 The provisions of section 7(e)(2) of the Act.

Section 7(e)(2) of the Act provides that the term ''regular rate'' shall not be deemed to include ''payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment * * *.'' However, since such payments are not made as compensation for the employee's hours worked in any workweek, no